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No. 98-316

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

OFFICE OF THE PRESIDENT, PETITIONER,

v.

OFFICE OF INDEPENDENT COUNSEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Independent Counsel

JOSEPH M. DITKOFF
BRETT M. KAVANAUGH
RONALD J. MANN
A. LOUISE OLIVER
Associate Independent Counsel

1001 Pennsylvania Ave., N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

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QUESTION PRESENTED

Whether under Fed. R. Evid. 501, this Court's decision in *United States v. Nixon*, 418 U.S. 683 (1974), and Section 535(b) of Title 28, a federal government agency can maintain an absolute government attorney-client privilege to withhold relevant evidence from a federal grand jury.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

(i) the United States of America, represented by the Independent Counsel In re Madison Guaranty Savings & Loan Association, *see* 28 U.S.C. § 594(a)(9); and

(ii) the Office of the President of the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported in redacted form at 148 F.3d 1100. The opinion of the district court (Pet. App. 36a-66a) is reported in redacted form at 5 F. Supp. 2d 21.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

Federal Rule of Evidence 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Section 535(b) of Title 28 provides in relevant part:

> Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General . . . .

STATEMENT

The United States, represented by the Office of Independent Counsel (OIC), filed a motion to compel Assistant to the President Bruce R. Lindsey to testify before a federal grand jury sitting in the District of Columbia. The Office of the President (hereafter "the White House") opposed the motion, asserting *inter alia* a government attorney-client privilege. The district court granted the OIC's motion to compel, Pet. App. 36a-66a, and the court of appeals affirmed, Pet. App. 1a-35a.

1. Pursuant to a January 16, 1998, order of the Special Division of the United States Court of Appeals for the District of Columbia Circuit, the OIC has been investigating whether President William J. Clinton, Monica S. Lewinsky, or others committed federal crimes in concealing the truth from the judicial process during the *Jones v. Clinton* sexual harassment lawsuit.

Shortly after the commencement of this investigation, the grand jury subpoenaed Bruce Lindsey to testify. On three occasions in February and March, Mr. Lindsey refused to answer questions, interposing claims including executive privilege and government attorney-client privilege. *See* Pet. App. 3a, 37a.

2. On March 6, 1998, the OIC moved to compel Mr. Lindsey's testimony. On May 4, 1998, the district court granted the motion to compel in its entirety, holding that neither executive nor government attorney-client privilege barred disclosure.

As to the government attorney-client privilege, the district court agreed with the Eighth Circuit's rejection of an absolute government attorney-client privilege in *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), *cert. denied*, 117 S. Ct. 2482 (1997). The district court concluded that any government attorney-client privilege could provide no greater protection than the executive privilege for presidential communications, a privilege that yields to the need for relevant evidence in criminal proceedings. *See United States v. Nixon*, 418 U.S. 683 (1974).

The district court found that the corporate attorney-client privilege did not support the White House's argument because "[a] private organization such as a corporation and a government institution such as the White House differ significantly, especially in the criminal context." Pet. App. 56a. The conduct of corporate employees "can expose a corporation to civil and criminal liability." *Id.* By contrast, the conduct of President Clinton "may subject [him] to criminal prosecution or impeachment," but it cannot expose the White House as an institution to criminal liability. *Id.*

The district court also relied on Section 535(b) of Title 28. That statute requires employees in the Executive Branch to expeditiously report to the appropriate law-enforcement official "any information" relating to federal criminal offenses committed by government officials. Based on this statute, the

district court stated that "White House attorneys, like all other executive branch employees, have a statutory duty to report any criminal misconduct by other employees." Pet. App. 57a.

The district court also analyzed the competing policy considerations. The court quoted with approval the Eighth Circuit's assessment that "the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of an absolute governmental attorney-client privilege in criminal proceedings inquiring into the actions of public officials." Pet. App. 58a (quotation omitted). The court further stated that it "shares the Eighth Circuit's belief" that "to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets." *Id.* (quotation omitted). White House attorneys, the court stated, "are paid by U.S. taxpayers" and are not paid to gather facts and provide advice with respect to "the private decisions of President Clinton, and certainly not private, potentially criminal conduct." *Id.* at 59a.

In sum, because the court found that the executive privilege did not bar production of the subpoenaed information in this case (in light of a factual submission filed by the OIC), it concluded that a government attorney-client privilege similarly did not bar production of the subpoenaed information. Pet. App. 60a-63a.

3. On May 28, 1998, in an effort to obtain Mr. Lindsey's testimony as quickly as possible, the OIC on behalf of the United States filed a petition for a writ of certiorari before judgment in this Court. In its brief in opposition to the petition, the White House abandoned its claims of executive privilege. White House Br. in Opp'n at 6, *United States v.*

Clinton, 118 S. Ct. 2079 (1998) (No. 97-1924).[1] The Court denied the petition. 118 S. Ct. 2079 (1998).

4. After expedited briefing and argument, the court of appeals affirmed the judgment of the district court. Pet. App. 1a-35a. At the outset of its opinion, the court stated:

> In these expedited appeals, the principal question is whether an attorney in the Office of the President, having been called before a federal grand jury, may refuse, on the basis of a government attorney-client privilege, to answer questions about possible criminal conduct by government officials and others. To state the question is to suggest the answer, for the Office of the President is a part of the federal government, consisting of government employees doing government business, and *neither legal authority nor policy nor experience suggests that a federal government entity can maintain the ordinary common law attorney-client privilege to withhold information relating to a federal criminal offense.*

Id. at 2a (emphasis added).

In reaching its conclusion, the court of appeals began by noting the differences between government attorneys and private attorneys: "When an executive branch attorney is called before a federal grand jury to give evidence about alleged crimes within the executive branch, reason and experience, duty, and tradition dictate that the attorney shall provide that evidence. With respect to investigations of federal criminal offenses, and especially offenses committed

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[1] Although the White House dropped its claim of executive privilege while the case was pending in this Court, it reasserted executive privilege with respect to Mr. Lindsey's testimony in a subsequent grand jury appearance in August 1998, and also with respect to testimony by other members of the White House Counsel's office that same month. *See* H.R. Doc. No. 105-310, at 206-09 (Sept. 11, 1998).

by those in government, government attorneys stand in a far different position from members of the private bar." Pet. App. 12a-13a. The court explained that the duty of government attorneys "is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure." *Id.* at 13a.

The court of appeals stated that the distinction between government attorneys and private attorneys is embodied in the Constitution, which requires that Executive Branch officials take an oath to defend the Constitution. "This is a solemn undertaking, a binding of the person to the cause of constitutional government, an expression of the individual's allegiance to the principles embodied in that document. Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency." Pet. App. 13a.

Citing sources as diverse as Judge Jack Weinstein, former White House Counsel Lloyd Cutler, former Solicitor General Robert Bork, and the Federal Bar Association, the court of appeals stated that the tradition of disclosure by government attorneys is deeply rooted. Pet. App. 14a, 17a. The court noted that it was "not aware of *any* previous deviation from this understanding of the role of government counsel." *Id.* at 18a (emphasis added).

The American tradition of guarding against public corruption further supported disclosure, the court concluded. Quoting James Madison, the court stated that "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy." Pet. App. 15a. Evidentiary privileges work against these interests in open government "because their recognition creates the risk that a broad array of materials in many areas of the executive branch will become sequester[ed]." *Id.* (quotation omitted). Furthermore, the court agreed with the Eighth Circuit that "to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal

investigation would represent a gross misuse of public assets." *Id.* (emphasis added) (quotation omitted).

The court of appeals also examined the implications of 28 U.S.C. § 535(b), the statutory reporting obligation applicable to Executive Branch employees. The court stated that "[w]e need not decide whether section 535(b) alone requires White House Counsel to testify before a grand jury," for "at the very least section 535(b) evinces a strong congressional policy that executive branch employees must report information relating to violations of Title 18, the federal criminal code." Pet. App. 16a (quotation omitted). "Section 535(b) suggests that all government employees, including lawyers, are duty-bound not to withhold evidence of federal crimes." *Id.* at 16a-17a. The court of appeals added that the White House itself had previously stated to the Supreme Court that it "embraces the principles embodied in section 535(b)" and that "the Office of the President has a duty, recognized in official policy and practice, to turn over evidence of the crime." *Id.* at 17a (quotation omitted).

The court of appeals noted that the White House's attempt to equate itself to a corporation for purposes of the attorney-client privilege failed, even on its own terms, to justify non-disclosure: "Under the widely followed doctrine announced in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), corporate officers are *not* always entitled to assert such privileges against interests within the corporation, and accordingly must consult with company attorneys aware that their communications may not be kept confidential from shareholders in litigation." Pet. App. 19a-20a (emphasis added). Based on *Garner*, the court of appeals stated that "[a]ny chill on candid communications with government counsel flowing from our decision not to extend an absolute attorney-client privilege to the grand jury context is both comparable and similarly acceptable." *Id.* at 20a.

The court of appeals also found the White House's argument irreconcilable with this Court's decision in *Nixon* because "there is no basis for treating legal advice differently

from any other advice the Office of the President receives in performing its constitutional functions." Pet. App. 2a.

> A President often has private conversations with his Vice President or his Cabinet Secretaries or other members of the Administration who are not lawyers or who are lawyers, but are not providing legal services. *The advice these officials give the President is of vital importance to the security and prosperity of the nation, and to the President's discharge of his constitutional duties. Yet upon a proper showing, such conversations must be revealed in federal criminal proceedings.* Only a certain conceit among those admitted to the bar could explain why legal advice should be on a higher plane than advice about policy, or politics, or why a President's conversation with the most junior lawyer in the White House Counsel's Office is deserving of more protection from disclosure in a grand jury investigation than a President's discussions with his Vice President or a Cabinet Secretary. In short, we do not believe that lawyers are more important to the operations of government than all other officials, or that the advice lawyers render is more crucial to the functioning of the Presidency than the advice coming from all other quarters.

Id. at 23a (emphasis added) (citations omitted).

As to the specter of impeachment raised by the White House, the court of appeals explained that the constitutionally based executive privilege for presidential communications, whatever its scope, was the only conceivable vehicle for the President to use in attempting to prevent congressional encroachment into Executive Branch communications. Pet. App. 20a-22a.

Based on all of these considerations, the court of appeals determined that "[t]he public interest in honest government

and in exposing wrongdoing by government officials, as well as the tradition and practice, acknowledged by the Office of the President and by former White House Counsel, of government lawyers reporting evidence of federal criminal offenses whenever such evidence comes to them, lead to the conclusion that a government attorney may not invoke the attorney-client privilege in response to grand jury questions seeking information relating to the possible commission of a federal crime." Pet. App. 2a.

Judge Tatel dissented in part. He agreed with the majority that "government lawyers working in executive departments and agencies enjoy a reduced privilege in the face of grand jury subpoenas." Pet. App. 24a. He also expressed doubt that the attorney-client privilege was implicated by the communications involved in this case: "[O]n this record it is not clear whether those communications involved official legal advice that would be protected by the attorney-client privilege." *Id.* If such communications were involved, however, Judge Tatel stated that he would draw a distinction between government lawyers serving the President and other government lawyers. Judge Tatel concluded that communications between the President and his official lawyers should be subject to an absolute government attorney-client privilege by which the President lawfully can prevent disclosure in federal criminal proceedings of information incriminating of himself or of others. *Id.* at 29a-32a.

ARGUMENT

The two courts of appeals that have considered the question presented — the D.C. Circuit and the Eighth Circuit — have decisively rejected the White House's legal argument. The only district court to decide the issue has done the same.[2] The courts have concluded that the White House's legal position is wrong as a matter of law and, if accepted,

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[2] The district court in the Eighth Circuit litigation did not reach this question.

would flout "the strong public interest in honest government" and would facilitate a "gross misuse of public assets." Pet. App. 2a, 15a, 58a; *Grand Jury*, 112 F.3d at 921.

The courts are not alone. The White House's argument is sufficiently unmoored from history, law, precedent, and policy that Attorney General Reno, Solicitor General Waxman, and Assistant Attorney General Hunger — political appointees of the President — took the extraordinary step of filing an amicus brief in the court of appeals that is *contrary* to the legal position of the White House (that is, of the President in his official capacity). *See* DOJ C.A. Br. 11 (the Department does "not agree with [the] submission [of the Office of the President]"); DOJ Motion (June 17, 1998).

Apart from the merits, the question presented is narrow. The petition presents only the application, in the grand jury setting, of Federal Rule of Evidence 501 and 28 U.S.C. § 535(b). The case does not concern the scope of a government attorney-client privilege when asserted in congressional proceedings or against parties other than the United States, such as in civil proceedings or cases under the Freedom of Information Act. Nor does the petition involve a *constitutionally* based privilege, such as the executive privilege for presidential communications.

Because the courts of appeals are in agreement, because the decisions of those courts are correct and thoroughly grounded in law and public policy, and because the legal issue is discrete and not constitutional, the petition should be denied.

I

1. The two courts of appeals that have decided this issue are in full accord. As a result, this Court's review is unnecessary to resolve any uncertainty in the law. *See* S. Ct. R. 10(a).

A year ago, the Eighth Circuit ruled that a government attorney-client privilege does not authorize non-disclosure of

information in federal criminal proceedings. *See Grand Jury*, 112 F.3d at 910. The White House filed a strongly worded petition for certiorari. But this Court, without dissent, denied the petition. 117 S. Ct. 2482 (1997). The only relevant change since the Court's denial of certiorari a year ago is that the D.C. Circuit now has addressed the issue and agreed with the Eighth Circuit's decision. As a result, the White House's current petition warrants certiorari no more than its petition of a year ago.

2. In addition, the petition raises an exceedingly narrow legal issue that does not pose the kind of far-reaching consequences that justify this Court's review notwithstanding the absence of a circuit split. The question presented concerns only a common-law government attorney-client privilege invoked against the United States in federal criminal proceedings. *See* Fed. R. Evid. 501, 1101. The issues *not* presented include the following:

First, the case presents no issue with regard to the scope of the privileges that an individual or private corporation can maintain.

Second, the petition raises no issue regarding the application of a government attorney-client privilege in *civil* proceedings. The decisions of the D.C. Circuit and the Eighth Circuit do not deny a government attorney-client privilege in federal civil proceedings where the government is opposed to a private party. *See* Pet. App. 6a-8a; *cf. Nixon*, 418 U.S. at 712 n.19.

Third, the case raises no question as to the scope of the privileges that the Executive Branch can maintain in *congressional* proceedings. The case concerns a *common-law* privilege claim under Rule 501, and Rule 501 does *not* apply to congressional proceedings. *See* Fed. R. Evid. 1101. Congress recognizes privileges only as required by the Constitution or pursuant to its own rules and practices under its Article I authority. *See* S. Rep. No. 104-191, at 11-12 (1995). The White House's references to impeachment thus

are a red herring: The *common-law* Rule 501 issue presented by the petition could not and would not have any effect in any impeachment or other proceedings that Congress may undertake. If the President seeks to advance a privilege claim based on his unique constitutional status and the possibility of impeachment proceedings, the appropriate vehicle (if any) is executive privilege.

Fourth, the case does not involve any constitutionally based privilege, such as the executive privilege for presidential communications. The White House maintains that the decision of the court of appeals "upsets the constitutional balance of powers." Pet. 18. That assertion makes no sense: The petition presents no constitutional question, and the White House has never suggested (nor could it plausibly do so) that *the Constitution* requires a government attorney-client privilege. In fact, even the historically rooted attorney-client privilege *for individuals* is not embodied in the Constitution.

Indeed, because the question presented involves only the application of a federal statute and a federal rule of evidence, Congress can further study the issue and address it legislatively. Alternatively, the President could direct the Attorney General to exercise her inherent constitutional authority and specific statutory authority under 28 U.S.C. § 535(b), which we discuss below, to establish regulations or policies limiting the information that federal prosecutors (including independent counsel) can obtain from government attorneys.[3]

In short, the question presented is narrow, it is not constitutional, and it does not justify review in the absence of disagreement in the courts of appeals.

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[3] An independent counsel would be bound by 28 U.S.C. §§ 594(f) and 596(a) to follow established, generally applicable regulations or policies "except to the extent that to do so would be inconsistent with the purposes" of the statute. *Id.* § 594(f).

3. The OIC filed a petition for certiorari before judgment in May 1998 based on the national interest in prompt completion of the aspects of the OIC's criminal investigation relating to Monica Lewinsky. At that time, it was our judgment that this Court's review would be a foregone conclusion if the D.C. Circuit were to disagree with the Eighth Circuit. And it also was our judgment that the Nation's interests would be best served by avoiding the delay occasioned by two layers of appellate review of the district court's decision. The only way *ex ante* to ensure that such delays did not occur was to seek certiorari before judgment.

Although this Court denied the petition, the D.C. Circuit subsequently agreed with the Eighth Circuit's decision. The agreement between the Eighth Circuit and the D.C. Circuit has avoided the circuit split that otherwise would have called for review by this Court. At this point, therefore, the bases on which we filed our petition for certiorari before judgment — the interest that the grand jury gather all relevant evidence in an expeditious manner and the concomitant necessity for final court rulings — counsel against certiorari.

II

The decisions of the D.C. Circuit and the Eighth Circuit are correct. Four separate sources of law dictate the conclusion that a government attorney-client privilege does not apply in federal criminal proceedings: (i) traditional considerations under Rule 501; (ii) this Court's precedent (particularly *United States v. Nixon*); (iii) Section 535 of Title 28; and (iv) public policy.

1. Traditional considerations undergirding Rule 501 analysis lend no support to the White House's claim. The federal courts apply common-law privileges "in the light of reason and experience." Fed. R. Evid. 501. The Court's decisions under Rule 501 rest on the premise that the public "has a right to every [person's] evidence," *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996), and treat that principle as "particularly applicable to grand jury proceedings," *Branzburg v. Hayes*,

408 U.S. 665, 688 (1972). This Court has been mindful that testimonial privileges "obstruct the search for truth," and thus has erected a "presumption against the existence of an asserted testimonial privilege." *Id.* at 690 n.29, 686. As the Court stated in *United States v. Nixon*, privileges "are not lightly created nor expansively construed." 418 U.S. at 710. Accordingly, the Court has limited the application of common-law privileges to circumstances in which the application is both (i) historically rooted or well recognized in the States and (ii) justified by a "public good." *Jaffee*, 518 U.S. at 9; *see Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2088 (1998); *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189, 195 (1990).

In this case, the historical and legal foundations for the White House's privilege claim are nonexistent. To our knowledge, no case, statute, rule, or agency opinion — *ever* — has concluded that a department or agency of the United States (or any state government entity) can maintain a governmental attorney-client privilege in federal criminal or grand jury proceedings. *See Grand Jury*, 112 F.3d at 916-18. Nor are we aware of a contemporary *state* case, law, or rule adopting the privilege for *public* attorneys in state criminal proceedings.

The practice of Executive Branch agencies further reveals that the privilege claim in the criminal context is not rooted in historical practice or contemporary understandings. In the Iran-Contra investigation, for example, White House and other government lawyers provided extensive information about their conversations with the President and other government officials. *See, e.g.*, Final Report of the Independent Counsel for Iran/Contra Matters, Vol. I, at 44, 346-48, 366-68, 470 n.137, 474-79, 517, 520, 536 & nn.116 & 117 (Aug. 4, 1993). In addition, in the OIC's investigation of other matters within its jurisdiction, the White House and other Executive Branch agencies have disclosed vast amounts of information that, under the White House's current

argument, would have been protected by a government attorney-client privilege.

In its amicus brief in the court of appeals, the Justice Department confirmed the absence of any historical or legal foundation for the White House's privilege claim. According to the Department, it is the "rare" case where information possessed by agency attorneys is withheld from a federal criminal investigation conducted by Department of Justice prosecutors. DOJ C.A. Br. 3-4. Indeed, the Department has not identified a single instance in which an Attorney General has authorized an agency to withhold important factual information from a federal criminal investigation on the sole ground that a government attorney representing governmental interests possessed the information.

This consistent practice, coupled with the absence of any authority supporting petitioner, both (i) refutes the White House's suggestion that a government attorney-client privilege has traditionally justified withholding relevant information from the federal criminal process and (ii) counsels judicial rejection of the White House's privilege claim. *See Swidler & Berlin*, 118 S. Ct. at 2088; *University of Pennsylvania*, 493 U.S. at 195; *Branzburg*, 408 U.S. at 685-87; *cf. Bankamerica Corp. v. United States*, 462 U.S. 122, 131 (1983) ("Government's failure for over 60 years to exercise the power it now claims . . . strongly suggests that it did not read the statute as granting such power").[4]

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[4] Leading commentators and the American Law Institute similarly have concluded that government entities should not possess the absolute attorney-client privilege available to corporations (particularly, when the privilege is asserted against the government). *See* 24 Wright & Graham, *Federal Practice and Procedure* § 5475, at 125 (1986) ("number of considerations" militate against "expansion of the privilege to all governmental entities"); *McCormick on Evidence* § 87.1, at 321 (4th ed. 1992) ("[w]here the entity in question is governmental . . . significantly different considerations appear"); Restatement (Third) of the Law Governing Lawyers § 124 cmt. b (Proposed Final Draft No. 1) ("More particularized rules may be necessary where one agency of government

2. As all of the courts to decide this issue have correctly concluded, the White House's privilege claim is irreconcilable with this Court's decision in *Nixon*.

In *Nixon*, the Court held that the executive privilege for Presidential communications — a privilege constitutionally based, historically rooted, and "fundamental to the operation of Government," 418 U.S. at 708 — was overcome by the need for relevant evidence in a criminal investigation. *Nixon* leads inexorably to the conclusion that a *common-law* government attorney-client privilege similarly must yield to the need for relevant evidence in a criminal investigation. *See* Pet. App. 23a (*Nixon* "severely undercuts the argument of the Office of the President regarding the scope of the government attorney-client privilege"); *Grand Jury*, 112 F.3d at 919 (*Nixon* "is indicative of the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes").

As the D.C. Circuit explained, there is no reason that "a President's conversation with the most junior lawyer in the White House Counsel's Office is deserving of more protection from disclosure in a grand jury investigation than a President's discussions with his Vice President or a Cabinet Secretary." Pet. App. 23a. In the end, this Court's decision in *Nixon* generates a fundamental question that the White House has been unable to answer: How, as a matter of federal common law, can communications between a President and his closest advisors (subject to a deeply rooted constitutional privilege "fundamental to the operation of Government") be deemed *less* worthy of protection in criminal proceedings than communications between *any* government employee and government attorney (as to which

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claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved.").

there is neither historical nor contemporary support for a privilege)?

Not only has the White House failed to persuasively answer the question, it has not tried. Its 29-page petition does not address *Nixon* — *at all* — despite the fact that both the Eighth Circuit and the D.C. Circuit found *Nixon* of substantial analytical importance.[5]

3. Even apart from the dearth of historical or contemporary support for the White House's argument, and even apart from *Nixon*, the White House's common-law privilege claim fails because it is contrary to federal statutory law. Rule 501 provides that privileges in federal proceedings are "governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience" except, *inter alia*, as "provided by Act of Congress." In this case, Section 535(b) of Title 28 imposes a specific statutory obligation on Executive Branch employees that contravenes the White House's common-law privilege claim. The statute provides that "*[a]ny information* . . . received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees *shall be expeditiously reported*" to the designated federal law-enforcement officer — in this instance, within his limited criminal jurisdiction, the independent counsel. 28 U.S.C. § 535(b) (emphasis added).[6]

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[5] The district court in this case and Judge Kopf in his separate opinion in the Eighth Circuit both concluded that government attorney-client communications should receive protection no greater than, but also no less than, the protection accorded Presidential communications under *Nixon*. That conclusion led those two Judges, based on their understanding of *Nixon*'s requirements relating to executive privilege claims, to suggest certain prerequisites that a prosecutor similarly must satisfy to obtain government attorney-client information. The district court found that the OIC had satisfied those requirements here. Pet. App. 47a, 63a.

[6] "When issuing [grand jury] subpoenas, an independent counsel stands in the place of the Attorney General." S. Rep. No. 100-123, at 22 (1987). The White House suggests that the OIC, by relying on Section

While not relying solely on Section 535(b), the D.C. Circuit stated that the statute "evinces a strong congressional policy that executive branch employees must report information relating to violations of Title 18, the federal criminal code." Pet. App. 16a (quotation omitted).[7] The court concluded that "Section 535(b) suggests that all government employees, including lawyers, are duty-bound not to withhold evidence of federal crimes." *Id.* at 16a-17a. The Eighth Circuit similarly found Section 535(b) "significant" because it established that "executive branch employees, including attorneys," have a duty to report information relating to criminal wrongdoing. *Grand Jury*, 112 F.3d at 920.

A variety of sources buttress the plain language of the Section 535(b) and support the conclusion that the statute requires disclosure of information by government attorneys

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535(b), is claiming to represent both the prosecutorial *and* non-prosecutorial interests of the United States. *See* Pet. 22-24. But that is not so. The President and the Attorney General possess inherent constitutional power and explicit statutory authority under Section 535(b) to order an independent counsel to withdraw a particular subpoena to an Executive agency. The President and Attorney General also could adopt regulations limiting the ability of federal prosecutors to obtain access to government attorney-client information. And they could order dismissal of an independent counsel if he or she refused to follow either such regulations or a direct order of the President or Attorney General. But a President and an Attorney General cannot end-run those constitutional and statutory mechanisms by asking the courts to create a *common-law* privilege in the face of a clear statutory disclosure obligation intended to grant the independent counsel free access and "complete cooperation."

[7] At various points in its petition, the White House suggests that the D.C. Circuit's opinion requires disclosure only of client communications that directly reveal criminal activity. *See* Pet. 16-18. At other places, however, the White House correctly states that the D.C. Circuit held that a government attorney-client privilege does not apply at all in federal criminal proceedings. *See* Pet. 12 (court "declar[ed] that no attorney-client privilege exists at all in criminal cases"). The latter is correct: If the court of appeals in fact had limited its ruling to communications that directly reveal criminal activity, the court could not have affirmed the judgment of the district court on this issue.

(unless some overriding constitutional privilege applies). They include:

(i) the legislative materials leading to enactment of Section 535(b), *see* H.R. Rep. No. 83-2622 (1954), *reprinted in* 1954 U.S.C.C.A.N. 3551, 3552 (federal prosecutor "should have complete cooperation from the department or agency concerned");

(ii) federal regulations, *see* 5 C.F.R. § 2635.107 (1998) ("Disclosures made by an employee to an agency ethics official [generally an attorney] are not protected by an attorney-client privilege. An agency ethics official is required by 28 U.S.C. 535 to report any information he receives relating to a violation of the criminal code.");

(iii) Office of Legal Counsel opinions, *see* 6 Op. OLC 626, 627 (1982) ("evidence of criminal conduct" uncovered during an inspector general investigation "will be referred directly to the Department of Justice, as is required by 28 U.S.C. § 535");[8] and

(iv) statements of former officials, such as former White House Counsel Lloyd Cutler, *see* Cutler, *The Role of the Counsel to the President of the United States*, *in* 35 Record of the Association of the Bar of the City of New York, No. 8, at 470, 472 (1980) (discussing "statutory duty to report to the Attorney General any evidence you run into of a possible violation of a criminal statute").[9]

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[8] The White House has previously cited several unpublished OLC memoranda and argued that they support a government attorney-client privilege available in criminal proceedings. But those memoranda refer only to representations of government employees in their *personal* capacities, such as in *Bivens* cases. Those OLC memoranda have no application here — as the Eighth Circuit correctly concluded a year ago when it reviewed those same materials. *See Grand Jury*, 112 F.3d at 921 n.10.

[9] Mr. Cutler added that "[w]hen you hear of a charge and you talk to someone in the White House . . . about some allegation of misconduct, almost the first thing you have to say is 'I really want to know about this, but anything you tell me I'll have to report to the Attorney General.'" *Id.*

In sum, the plain language and traditional understanding of Section 535(b) preclude the White House's *common-law* privilege claim.[10]

4. Even if the White House could establish that its claim were (i) rooted in historical or contemporary law, (ii) consistent with this Court's precedents, and (iii) compatible with federal statutory law, it still would have to demonstrate that application of this privilege against the United States in federal criminal proceedings would serve a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Jaffee*, 518 U.S. at 9. The opinions of the Eighth and D.C. Circuits powerfully illustrate that the relevant policy considerations do not support the White House's claim.

To begin with, under the White House's theory, a government official (including a President) could tell a White House or other agency attorney that he had concealed subpoenaed documents or physical evidence, and the communication would be absolutely privileged in criminal proceedings. An agency employee could tell an agency attorney that he had falsified his financial disclosure form or embezzled money from the agency, and the communication would be absolutely privileged in criminal proceedings. A prison guard might admit to an agency attorney that he had

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[10] This Court has refused to apply common-law privileges that would contravene statutory disclosure or reporting requirements. In *University of Pennsylvania*, for example, this Court rejected an academic peer-review privilege claim because Title VII authorized government access to information relevant to a discrimination charge and did "not carve out any special privilege relating to peer review materials." 493 U.S. at 191. Similarly, in *United States v. Arthur Young & Co.*, the Court rejected an accountant's work-product claim because Section 7602 of Title 26 granted the IRS a right of access without providing a privilege. The Court stated that "the very language of § 7602 reflects . . . a congressional policy choice in favor of disclosure of all information relevant to a legitimate IRS inquiry. . . . If the broad latitude granted to the IRS by § 7602 is to be circumscribed, that is a choice for Congress, and not this Court, to make." 465 U.S. 805, 816-17 (1984).

beaten a prisoner, and the communication would be absolutely privileged in criminal proceedings. It strains credulity that such results — in which attorneys who are *public* employees conceal evidence from the criminal process — serve a "public good."

The White House's desire for a blackout of government information from the grand jury also conflicts with first principles. As the D.C. Circuit stated, "openness in government" — particularly when White House officials may have committed crimes — "has always been thought crucial to ensuring that the people remain in control of their government." Pet. App. 15a (quotation omitted). And as the federal courts have concluded, the White House's contrary and ahistorical vision of the role of government attorneys both flouts the "strong public interest in honest government" and represents "a gross misuse of public assets." *Grand Jury*, 112 F.3d at 921; Pet. App. 15a, 58a.

The White House nonetheless insists that the attorney-client privilege must apply to government agencies against the grand jury to the same extent that it applies to corporations against the grand jury. But a government agency has a dramatically different relationship to the criminal process than does a corporation. The most obvious difference is that a corporation can be indicted, whereas a government entity cannot. That means that the White House as an institution (or the President in his official capacity) can never be a defendant adverse to the United States in a criminal case. *See Grand Jury*, 112 F.3d at 920.

Even were the Court to accept the threshold validity of the White House's argument that it is akin to a corporation, that argument still would not support the White House's conclusion. If corporate shareholders bring a lawsuit alleging misconduct on the part of corporate managers, the attorney-client privilege does not bar the testimony of the corporation's attorneys. *See Garner v. Wolfinbarger*, 430 F.2d 1093, 1103-04 (5th Cir. 1970) (no absolute corporate attorney-client privilege in the context of a shareholder derivative suit); *see*

also Restatement § 134B reporter's note (approving *Garner* principle and stating that it has been "widely followed," including in areas "beyond shareholder suits"). "Although the *Garner* rule does increase uncertainty to some extent, *the risk is not great for organizations attempting to comply with the law in good faith.*" Restatement § 134B reporter's note (emphasis added).

The *Garner* principle, applied to the government context, is straightforward: A federal government agency cannot rely on a common-law attorney-client privilege to thwart the United States' right to information any more than a corporation can do so to frustrate its shareholders' right to information. As the D.C. Circuit stated, "[a]ny chill on candid communications with government counsel flowing from our decision not to extend an absolute attorney-client privilege to the grand jury context is both comparable and similarly acceptable." Pet. App. 20a.

Moreover, apart from *Garner*, the primary justification for the corporate attorney-client privilege does not apply to government agencies. The corporate privilege serves the policy of encouraging corporations to conduct internal fact-finding and thereby promote broader interests in observance of the law. *See Upjohn Co. v. United States*, 449 U.S. 383, 391-92 (1981). If there were no corporate privilege, corporations would be discouraged from conducting internal investigations because the facts developed would be subject to immediate disclosure to a federal grand jury, thereby exposing the corporation to serious criminal liability.

That legal deterrent to gathering facts and performing legal work does not apply in the governmental context. Federal agencies, unlike corporations, are not subject to criminal investigation or indictment by the United States. When an agency becomes aware of internal wrongdoing, the agency's *governmental* interest is to ferret it out, and there can be no risk of endangering a *governmental* interest by

doing so and by disclosing the results to federal law enforcement authorities. *Cf.* 28 U.S.C. § 535(b).[11]

Finally, this Court has firmly rejected the suggestion that the common law of privileges takes no account of the different responsibilities of public and private entities. In declining to apply a work-product privilege to an accountant's workpapers, the Court emphasized:

> The *Hickman* work-product doctrine was founded upon the private attorney's role as the client's confidential advisor and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. . . . [T]he independent auditor assumes a *public* responsibility . . . . This "public watchdog" function demands that the accountant maintain total independence from the client at all times and *requires complete fidelity to the public trust.* To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with *public* obligations.

Arthur Young, 465 U.S. at 817-18 (emphases added). The Court's language applies here as well: Government attorneys, far more than accountants, owe a public duty inconsistent

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[11] The White House suggests, however, that the lack of a government attorney-client privilege would result in a chilling effect on communications by government employees to government attorneys. Pet. 25. But an employee communicating to an agency attorney does not control the ultimate assertion of any privilege. Accordingly, the employee can have *no* assurance that the communications will remain confidential if called for in federal criminal proceedings, regardless of what the privilege rule may be. A President similarly could not be assured of the ultimate protection from the criminal process of his communications to *government* lawyers: The President's control over the privilege for his own communications terminates when he leaves Office. *See CFTC v. Weintraub*, 471 U.S. 343, 349 & n.5 (1985).

with application of governmental attorney-client privilege in federal criminal proceedings.

5. One further aspect of the petition warrants mention. Because this Court denied certiorari a year ago on the same legal issue and the D.C. Circuit has now issued an opinion agreeing with the Eighth Circuit, the White House has sought to locate supposed "changes" in the law to support a different outcome for its current petition. The White House thus has seized upon this Court's recent decision in *Swidler & Berlin*. In that case, the Court refused to expand the will-contest exception to the attorney-client privilege after the client's death to other cases, including to criminal cases. *See* 118 S. Ct. at 2085, 2087.[12]

According to the White House, the upshot of *Swidler & Berlin* is that there can be no distinction for the *government* attorney-client privilege between civil cases and criminal cases. The White House's reliance on *Swidler & Berlin* ignores the fact that the distinction at issue here, however, is not simply criminal-civil but also between (i) cases in which the government asserts the privilege against a private party (which generally will be civil cases) and (ii) cases in which the government attempts to assert a privilege against itself (which generally will be criminal cases).[13]

In any event, the Court's opinion in *Swidler & Berlin* regarding criminal and non-testamentary civil proceedings referred only to the *posthumous* privilege question at issue there. *See* 118 S. Ct. at 2087. The Court did not purport to

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[12] At oral argument in the D.C. Circuit, the White House placed heavy reliance on *Swidler & Berlin*, which had been decided four days earlier. As its opinion reveals, the court of appeals found the argument entirely unpersuasive.

[13] *See* Restatement § 124 cmt. b ("More particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved.").

lay down a sweeping new rule that *all* evidentiary privileges are suddenly "all or nothing" and must be absolute or identical in all proceedings if they are to exist at all. Indeed, if *Swidler & Berlin* had done so, the courts now would have to redefine the contours of, for example, the qualified attorney work-product privilege, many government privileges (including executive privilege), certain established exceptions to the attorney-client privilege, and the reporter's privilege.[14]

Indeed, even in *Swidler & Berlin* itself, the Court did not hold that the *posthumous* attorney-client privilege applies identically in all civil and criminal settings. To the contrary, the Court reaffirmed the testamentary rule, under which the privilege does not apply in certain kinds of civil cases (those involving will contests). *Swidler & Berlin* thus endorsed the longstanding principle that context counts in assessing a privilege claim. *See also Nixon*, 418 U.S. at 712 n.19 (recognizing that executive privilege for presidential communications may apply differently in civil and criminal proceedings).

In the end, the White House's discussion of *Swidler & Berlin* boils down to the proposition that this Court, in a single passage in a case involving the post-death application of the individual attorney-client privilege, overruled *Nixon* and the line of *governmental* privilege cases indicating that *governmental* privileges do not necessarily apply the same in

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[14] In addition, Congress recently enacted a law (which the President signed) that provides a new form of attorney-client/accountant-client privilege that applies in "any *noncriminal* tax matter before the Internal Revenue Service" and in "any *noncriminal* tax proceeding in Federal court brought by or against the United States." Pub. L. No. 105-206, § 3411(a), 112 Stat. 685, 750 (1998) (emphases added) (codified at 26 U.S.C. § 7525(a)). Congress and the President thus have not subscribed to the novel, all-or-nothing privilege regime advanced by the White House in its petition.

criminal and civil cases.[15] Contrary to the White House's assertion, we do not believe that the Court in *Swidler & Berlin* achieved (or sought to achieve) any such dramatic alteration of legal principles not presented in that case; indeed, the entire thrust of the Court's opinion was to resist any perceived change in the law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Independent Counsel

JOSEPH M. DITKOFF
BRETT M. KAVANAUGH
RONALD J. MANN
A. LOUISE OLIVER
Associate Independent Counsel

1001 Pennsylvania Ave., N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

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[15] Under the White House's reading of *Swidler & Berlin*, executive privilege presumably now could be overcome in *civil* cases as easily as it can be overcome in criminal cases.